APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action 131-72

LEONARD A. PETO, *Plaintiff*,

v.

MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS, JOHN REED KILPATRICK, EDWARD S. IRISH, ARTHUR M. WIRTZ, and WALTER ANNENBERG, *Defendants*.

Opinion, March 10, 1965, by Judge Charles H. Tenney, denying Defendants' Motion for Summary Judgment

Opinion

Defendants, Madison Square Garden Corporation, Ringland F. Kilpatrick, Jr., as Executor of the Estate of John Reed Kilpatrick, Edward S. Irish, James D. Norris and Arthur M. Wirtz, move for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the ground that the within action is barred by the applicable statute of limitations.

Plaintiff brought this action for treble damages pursuant to the provisions of the Sherman Anti-Trust Act, 15 U.S.C. § 1, *et seq.* and of the Clayton Anti-Trust Act, 15 U.S.C. § 12, *et seq.*, alleging that the defendants have combined to restrain trade and commerce and to establish a monopoly in the operation of major league professional hockey teams, and have succeeded in monopolizing and obtaining complete domination and control over the major league hockey industry, including the granting of franchises for additional clubs.

The plaintiff also alleges that the individual defendants, with the exception of defendant Annenberg, were the chief executive officers and stockholders of defendant Madison Square Garden Corporation, and controlled and dominated

it as well as two other corporations which, together with Madison Square Garden, owned and operated professional hockey teams in the National Hockey League.

The complaint further alleges that the National Hockey League is the only major hockey league and consists of six teams, three of which the defendants own, control and dominate, viz, the New York Rangers, the Chicago Black Hawks and the Detroit Red Wings.

It is also alleged that, in or about 1945, plaintiff was invited and solicited by the National Hockey League to acquire, purchase and take over the inactive franchise of the Montreal Maroons Hockey Club, and to establish, maintain and operate a major league hockey team in the City of Philadelphia. Plaintiff claims that, in reliance thereon, he acquired said franchise, purchased real property in Philadelphia for the erection of an arena, set about acquiring players and financial backing, and otherwise expended large sums of money.

Plaintiff claims that, as a result of the combination and conspiracy of the defendants, he has been prevented, precluded and foreclosed from constructing, acquiring or operating a sports arena in the City of Philadelphia, and from establishing, maintaining and operating a major league hockey team in the City of Philadelphia within the National Hockey League.

Defendants in their answers plead a general denial, and as an affirmative defense, the applicable state statute of limitations.[1] By amendment of their answers they further plead the Federal statute of limitations contained in Sec-

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[1] If the action accrued in 1954 or prior thereto, New York law would apply. *Leonia Amusement Corporation* v. *Loew's, Inc.*, 117 F. Supp. (S.D.N.Y. 1953) (6 years); *Leh* v. *General Petroleum Corp.*, 330 F.2d 288, 289 (9th Cir. 1964), cert. granted, 13 L.Ed. 2d 85 (Oct. 19, 1964).

tion 4B of the Clayton Anti-Trust Act, 15 U.S.C. § 15b (hereinafter referred to as Section 4B).

Defendants support their contention that plaintiff's cause of action is barred by Section 4B upon portions of plaintiff's deposition and upon certain correspondence produced by him at his deposition, which correspondence was received by him from, or sent by him to, the National Hockey League.

The gist of defendants' position is that the alleged wrong occurred nine years prior to the commencement of this action and that the action is therefore barred by the statute of limitations. Plaintiff filed his complaint herein on March 17, 1958.

The following uncontroverted factual background, based on portions of plaintiff's deposition and the abovementioned correspondence, has been considered in the Court's analysis of defendants' contention that the action is barred by the statute of limitations.

The Board of Governors of the National Hockey League, on December 14, 1945, held a meeting at which they passed a resolution conditionally transferring to plaintiff the franchise formerly operated by the Canadian Arena Company, it being the intention of plaintiff and his associates to erect a suitable arena in the Philadelphia area for the operation of a team in the National Hockey League. The transfer of the franchise, as recited in the resolution, was conditional upon plaintiff's furnishing, by the February 1946 meeting of the Board of Governors, evidence of financial backing satisfactory, in the opinion of the Governors, to assure the completion of the arena and the operation of a club in the National Hockey League.

A further condition of the resolution was that, should this arena not be completed by April 30, 1947, the present resolution and any other resoultion, motion or agreement to implement this resolution, should be deemed can-

celled, and plaintiff and his associates, and the said Corporation, should have no rights whatsoever arising therefrom. In such event the franchise referred to above would revert to the Canadian Arena Company as if no transfer had been made. A copy of this resolution was received in the mail on December 19, 1945, by plaintiff.

In April of 1946, plaintiff entered into a written agreement with the Canadian Arena Company relating to the acquisition of the Montreal Maroons Hockey Club franchise for $25,000 subject to the approval and confirmation of the National Hockey League. The written agreement also contained a provision that "in the event of the approval and confirmation of the National Hockey League being withheld or the project of a suitable building in which to operate a hockey club under the said franchise in the National Hockey League not being erected within the period set by the National Hockey League, the said franchise shall revert to the Candian Arena Company upon the return to plaintiff of the purchase price."

Plaintiff, in his deposition, testified that from March 26, 1946 through February 12, 1947, the Civilian Production Administration (hereinafter referred to as "C.P.A.") banned the construction of new sports arenas, and therefore he was completely prohibited by the C.P.A. from erecting a sports arena in Philadelphia, although during that period he made application for authority to construct such an arena. Plaintiff did obtain a partial permit for foundations and structural steel in May of 1947.

By letter dated June 6, 1947, Clarence Campbell, President of the National Hockey League, informed plaintiff that at the June 2-3 meeting of the Board of Governors he was granted an extension of time for compliance with the terms of the resolution of December 14, 1945 until the 1st of June 1948. In all other respects the terms of the resolution were to remain in effect

On May 12, 1948, Campbell advised plaintiff that the annual meeting of the Board of Governors was to take place on June 2d and 3d, 1948, and that "[i]f there is any information that you would like me to transmit to the Governors I will be glad to do so on receipt of same from you." Plaintiff responded to Campbell by letter dated May 19, 1948, that he "would have a report in his hands in good time."

Plaintiff, in a letter addressed to President Campbell dated June 2, 1948, indicated that all building controls were rescinded April 1, 1948, that he had support in Philadelphia for the project and requested not merely a formal extension of time for compliance with the resolution but suggested other changes in the arrangement.

President Campbell, by registered letter dated June 10, 1948, confirmed what he had told plaintiff orally the evening of June 2, 1948, during the meeting of the Board of Governors, that "the conditions . . . under the Agreement set out in the League Resolution of December 14, 1945 not having been fulfilled by June 1, 1948, as required by the extension granted at your request at the Annual Meeting of the League on June 2, 1947, the Governors consider the Agreement has terminated and are not prepared to grant further extension of it."

Thereafter the Candian Arena Company, the seller of the inactive Maroon franchise to plaintiff, returned the purchase price of $25,000 to plaintiff.

On May 26, 1949, plaintiff reported by letter to the Board of Governors of the National Hockey League, through Campbell, that he had been continuously negotiating for the construction of an arena in Philadelphia, that conditions were resolved to a degree which indicated the probability that the project could be financed, and work started, in a very short while, and that "interests" with ample means and connections were now favorably disposed. He

further reported that "[t]o all of these interests, I have responded to inquiries as to an eventual franchise in the League by quoting the assurance given to me by you that the Governors would act favorably upon application from me on behalf of a Club adequately financed and satisfactorily sponsored."

In reply, Mr. Campbell wrote plaintiff on June 7, 1949, indicating that "[he] desired to make claim on [his] own behalf and on behalf of the Governors of the League, that any application which [plaintiff] might make to the National Hockey League for a franchise in Philadelphia would have to be treated strictly on its own merits since the original application and the option resulting from it were definitely terminated in June 1948."

Plaintiff admits that, subsequent to 1948 or 1949, he never applied for admission or membership in the National Hockey League.

Plaintiff does not controvert the aforementioned recitation of facts, but contends that they do not establish the applicability of the statute of limitations.

Plaintiff urges that necessarily implicit in the operation of a hockey team is the construction of an arena wherein the games would be played. Plaintiff also claims that, as a requisite condition to the operation of a hockey team, he continued his efforts to finance the construction of an arena from December 12, 1948 to January 25, 1956. Accepting this as true (see Exhibits to Plaintiff's Affidavit of May 7, 1964 in opposition to the within motion), it can hardly be maintained that plaintiff was not aware as early as June 14, 1949 of what he considered "collusive and fraudulent" conduct on the part of certain of the defendants (Exhibit C to Plaintiff's Affidavit). See *Atlantic City Electric Co.* v. *General Electric Co.*, 312 F.2d 236 (2d Cir. 1962), cert. denied, 373 U.S. 909 (1963).

Plaintiff also suggests that the purported termination of his rights by the National Hockey League in 1948 was part and parcel of the conspiracy alleged which, by a necessary reference, includes defendants' unlawful agreement to limit new League members to only such persons as would be selected and approved by defendants.

It is plaintiff's position that since a potential operator of a major league hockey team must be a member of the National Hockey League, the maintenance of monopoly power to prevent such membership, buttressed by defendants' actions continuing as late as 1955, extended the life of the conspiracy charged to at least that date, and the statute would thus not begin to run until that date, rather than from the earlier 1948 date as urged by defendants.

On the basis of the foregoing recitation of the facts, defendants urge that plaintiff's cause of action accrued during June of 1948, when the Board of Governors of the National Hockey League, allegedly under the control of certain of the defendants, denied plaintiff's request for an extension of time to build a sports arena, a condition precedent before the National Hockey League would grant him a hockey franchise.

Defendants contend that plaintiff's action is barred by the four-year statute of limitations, contained in Section 4B, as the cause of action accrued in 1948 and suit was not commenced until March 17, 1958, well beyond the Federal four-year period for bringing such a suit, or the New York six-year limitation.

Assuming for the purposes hereof that defendants conspired to prevent plaintiff from "constructing, acquiring, carrying out or otherwise operating a sports arena in the City of Philadelphia" (Paragraph 13 of Complaint), and that the action of the National Hockey League in cancelling plaintiff's franchise was at the instance of defendants in furtherance of such conspiracy, what, if any,

overt acts were committed by defendants subsequent to June 1, 1948? A right of action for a civil conspiracy under the Anti-Trust Laws accrues from the commission of the last overt act in furtherance of the conspiracy causing injury or damage. *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963) (Per curiam); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956); *Rutkin* v. *Reinfield*, 229 F.2d 248 (2d Cir.), cert. denied, 352 U.S. 844 (1956); *Molinas* v. *National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961). Furthermore, "[i]n a continuing conspiracy causing continuing damage without further overt acts the statute of limitations runs . . . from the time the blow which caused the damage was struck. Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run. Otherwise, in a continuing conspiracy, the cause of action of an injured party would never fully develop, nor would there be any limitation upon the right of action, and the beneficent purpose of the statute to delimit the right to sue would be defeated." *Steiner* v. *Twentieth Century-Fox Film Corp.*, *supra*, at 195.

Accordingly, a continued refusal of the National Hockey League, at the instance of defendants, to grant plaintiff a franchise would not constitute further overt acts of a type which could postpone the operation of the statute. *Garelick* v. *Goerlich's, Inc.*, *supra*. Unlike the distributors in Garelick who requested reinstatement, plaintiff subsequent to 1949 never applied for admission to or membership in the National Hockey League. Moreover, even if he had reapplied and been turned down because of the action of defendants, such action, paraphrasing the language of *Garelick*, *supra* at 856, would simply have reflected defendants' continued refusal to grant him a franchise. Accord, *Baldwin* v. *Loew's Inc.*, 312 F.2d 387 (7th Cir. 1963); *Steiner* v. *Twentieth Century-Fox Film*

Corp., supra; Fleischer v. *A.A.P., Inc.*, 180 F. Supp. 717 (S.D.N.Y. 1959).

The defendants, in their papers, equate the National Hockey League's refusal to give plaintiff an extension of time to construct a sports arena in 1948 with the initial overt acts in *Garelick, supra, Fleischer, supra,* and *Baldwin, supra*; that is, in the *Garelick* case, the letter which indicated defendant would cease doing business with plaintiffs; in the *Fleischer* case, the making of the contract which covered distribution of cartoons by defendants; and, in the *Baldwin* case, the execution of the 1945 lease. Defendants argue that any acts of defendants subsequent to 1948 merely reflect defendants' continued refusal to grant plaintiff a franchise, and, if anything, result in added damages.

However, plaintiff, in his complaint, besides alleging that defendants, by their domination of the National Hockey League, have prevented plaintiff from obtaining a hockey franchise, alleges that by reason of their domination of the hockey industry they have also prevented, prohibited and foreclosed him from constructing, acquiring, carrying out or otherwise operating a sports arena in the City of Philadelphia.

Plaintiff, in his affidavit in opposition to defendants' motion for summary judgment, alleges that he continued his efforts to finance the construction of a sports arena ranging in date from December 12, 1948 to January 25, 1956, as evidenced by copies of the correspondence attached to his affidavit.

Plaintiff, more importantly, claims that in 1955 one of his potential backers, Cliff Hemphill, declined further participation in the project because defendant Kilpatrick had warned him against participating, and that another prospective backer, John McGeary, was told that he should check with Madison Square Garden regarding his project,

that in due course the "right people" would build an arena in Philadelphia and that would be the time to join with Madison Square Garden. Defendants do not deny this beyond stating that plaintiff has not alleged a single overt act by defendants after June 1948. It should be noted that plaintiff does not allege that defendant Kilpatrick "warned" Hemphill in 1955, nor does plaintiff identify McGeary's source of information as any of the defendants.

However, as to Kilpatrick, the date when he "warned" Hemphill may be considered an issue in dispute.

The determinative issue in each of the cases cited by defendants in support of their motion was that the overt acts did not cause damage to plaintiff and were part of a continuing course of conduct. In addition, the subsequent conduct of the defendants in those cases might be considered as negative in character.

The case at bar offers a different factual background for the application of the general principles hereinbefore referred to. Plaintiff alleges affirmative conduct on the part of the defendants in warning prospective financial backers from participating in his project. Therefore, the facts at bar, uncontroverted for the purposes of this motion, might indicate affirmative conduct on the part of the defendants in 1955 to prevent plaintiff from obtaining the financial support necessary to construct and operate a sports arena in Philadelphia. It would appear that such conduct on the part of defendants would interfere with plaintiff's efforts to construct a sports arena as a prerequisite to obtaining a hockey franchise, and constitute more than a continuation of prior conduct exercised through domination of the National Hockey League.

Plaintiff should not be deprived of an opportunity to present proof on this allegation. *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 23 F.R.D. 251 (E.D.N.Y. 1959);

Life Music, Inc. v. *Broadcast Music, Inc.*, 23 F.R.D. 181 (S.D.N.Y. 1959).

However, in its discretion, the trial court may desire to have this issue of the statute of limitations, as it relates to the alleged occurrences of 1955, tried prior to the trial of the other issues. See *Bertha Bldg. Corp.* v. *National Theatres Corp.*, 248 F.2d 833 (2d Cir. 1957), cert. denied, 356 U.S. 936 (1958); *Steiner* v. *Twentieth Century-Fox Film Corp., supra; Banana Distributors* v. *United Fruit Co.*, 162 F. Supp. 32, 35 (S.D.N.Y. 1958).

Plaintiff also asserts that even if defendants' assertion as to the date of the applicable overt act from which the statute of limitations runs is accepted, the commencement of the Government action in *United States* v. *International Boxing Club of New York, Inc., et al.*, Docket 74-81 (S.D. N.Y.) on March 17, 1952, effectively tolled the statute pursuant to Section 5(b) of the Clayton Act (15 U.S.C. § 16(b), (hereinafter referred to as "Section 5(b)"), since the within action was commenced on March 17, 1958, prior to the termination of the *International Boxing Club* case on January 12, 1959.

The test to be applied in determining whether the tolling provisions of Section 5(b) should be invoked is enunciated in *Steiner* v. *Twentieth Century-Fox Film Corp., supra*, where the Court said:

> ". . . [I]n order for the statute of limitations to be tolled for private litigants in antitrust conspiracy actions, the matters complained of in the private proceeding must be the same acts to achieve the same conspiracy complained of in the conspiracy complained of in the action brought by the United States. . . . The same means must be used to achieve the same objectives of the same conspiracy by the same defendants." *Id.* at 196.

The question then is whether plaintiff herein and the United States in *International Boxing Club, Inc.* complained that the *same means* were used to obtain the *same objectives* of the *same conspiracies* by the *same defendants.* A comparison of the two actions and the respective complaints makes it obvious they did not. The means, the objectives, the conspiracies, and the defendants all differed in whole or in part. Furthermore, the conspiracy complained of in *International Boxing Club, Inc.* was alleged not to have commenced until January of 1949. Accordingly, Section 5(b) is not applicable hereto.

The within motion for summary judgment is disposed of as noted above.

Settle order on notice in conformity herewith.

Dated: New York, New York.
March 10, 1965.

CHARLES H. TENNEY
U.S.D.J.

APPENDIX B

Defendants' Notice, March 19, 1965, addressed to Plaintiff's attorneys, Greenfield and Rothstein, of Defendants' Motion to apply for leave to re-argue their Motion for Summary Judgment.

Notice of Motion

SIRS:

PLEASE TAKE NOTICE that upon the determination of Honorable Charles H. Tenney, United States District Judge, United States District Court, Southern District of New York, dated March 10, 1965, defendants' memorandum served herewith, and upon all of the papers previously filed herein, the undersigned will move this Court at a motion part hereof, held in Room 506, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 30th day of March, 1965, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order granting defendants leave to reargue their motion made pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of defendants Madison Square Garden Corporation, James B. Norris, Edward S. Irish, Ringland F. Kilpatrick, Jr., as executor of the estate of John Reed Kilpatrick, deceased, and Arthur M. Wirtz, because plaintiff failed to institute this action within the time prescribed by law and is therefore barred by the applicable statute of limitations, and, upon such reargument, for an order granting defendants' said motion for summary judgment.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9(c) of the Rules of this Court answering memoranda are required to be served at least three days prior to the return day of this motion.

Dated: New York, N. Y.,
March 19, 1965.

Yours, etc.,

SIMPSON THACHER & BARTLETT,
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To:

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APPENDIX C

Memorandum by Judge Tenney, dated November 15, 1965, ordering Plaintiff to take depositions of Cliff Hemphill and John McGeary.

TENNEY, J.

Memorandum

Defendants' within motion for reargument is granted to the extent that plaintiff is directed to take the deposition of Mr. Cliff Hemphill and Mr. John McGeary concerning the matters attributed to them in plaintiff's affidavit in opposition to defendants' motion for summary judgment.

The deposition should be taken within a reasonable time.

A transcript of the aforementioned depositions should be submitted to the Court for further consideration of defendants' motion for reargument.

So ordered.

Dated: New York, New York.
November 15, 1965.

CHARLES H. TENNEY
U.S.D.J.

APPENDIX D

Memorandum by Judge Tenney, dated April 1, 1966, holding that Plaintiff's Limitation was not tolled by *United States* v. *International Boxing Club of New York, et al.* (Docket 74-81, S.D.N.Y.), March 17, 1952, and further re depositions to be taken by Plaintiff.

TENNEY, J.

Memorandum

Plaintiff moves herein to reargue this Court's prior decision which held that the statute of limitations was not tolled by reason of the commencement of the Government

action in *United States* v. *International Boxing Club of New York, Inc., et al.*, Docket 74-81 (S.D.N.Y. March 17, 1952). In support of his motion, plaintiff cites *Leh* v. *General Petroleum Corp.*, 382 U.S. 54 (1965), and *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965).

While the present viability of *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956), is somewhat in doubt in view of the *Minnesota Mining* and *Leh* decisions above, I find the cases inapposite and the criteria therein set forth not satisfied by the facts presented in the instant case.

A comparison between the complaint in the Government suit (docket 74-81) above (it is summarized in *United States* v. *International Boxing Club of New York, Inc.*, 150 F. Supp. 397, 400 (S.D.N.Y. 1957), and a copy of which is attached to the affidavit of Robert S. Carlson, dated May 12, 1964), and the complaint in the instant action, reveals that they do not involve "substantially the same claims" (*Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co., supra,* 381 U.S. at 323), nor do the matters complained of in the Government suit bear a real relationship to the private litigant's claim for relief. (*Leh* v. *General Petroleum Corp., supra,* 382 U.S. at 59.) Moreover, a comparison of the conspiracy alleged in the Government suit and in the private suit in *Leh, supra,* as well as a comparison of the Federal Trade Commission proceeding and the private litigant's suit in *Minnesota Mining Co., supra,* reveals how similar the Government and private suits were and only highlights the dissimilarity present herein.[1]

Accordingly, my prior decision is amended by the present memorandum but is in all other respects adhered to.

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[1] Indeed, the rationale set forth in *Leh, supra,* 382 U.S. at 64, upon which the Court held that there need not be complete identity of defendants, further reveals how "substantially similar" the two suits must be before the statute is tolled.

The depositions heretofore noticed are to be completed by April 25, 1966.

So ordered.

Dated: New York, New York.
April 1, 1966.

CHARLES H. TENNEY
U.S.D.J.

APPENDIX E

Final Decree by Judge Tenney, dated November 30, 1966, holding that Plaintiff's claim is barred by Limitations.

Memorandum

TENNEY, J.

On March 10, 1965, this Court denied defendants' motion for summary judgment on the ground that a material issue of fact was in dispute. The defendants had contended that the within action was barred by the applicable statute of limitations. In that opinion, it was determined that the date when the deceased defendant Kilpatrick had "warned" one Hemphill against further participation in plaintiff's project to finance the construction of a sports arena was an issue in dispute. The facts were set forth fully in the prior opinion and will not be restated.

Defendants moved for reargument on the ground that the alleged Kilpatrick "warning" was based on a hearsay statement contained in plaintiff's affidavit and that said statement could not be properly considered on a motion for summary judgment. Said motion for reargument was granted on November 15, 1965, to the extent of directing plaintiff to take the depositions of one John D. McGeary and the aforementioned Cliff Hemphill, regarding their alleged repetition to plaintiff of statements made by Kil-

patrick. Mr. Hemphill died in August, 1966, without ever being deposed by plaintiff's counsel. It appears that plaintiff's counsel made no attempt to take Hemphill's deposition until April, 1966, at which time he was too critically ill to appear. Mr. McGeary's deposition was taken in two sessions: April 20, 1966 and June 23, 1966. The transcript of the McGeary testimony comprises 124 pages and is not strictly limited to the issue alleged in plaintiff's affidavit.

Although Mr. McGeary stated that many of the occurrences were dulled in his mind by the passage of time, in response to questions propounded regarding his relationship to the deceased defendant John Reed Kilpatrick, he stated unequivocally that he had neither met said defendant nor conversed with him, although he knew of said defendant's identity. Deponent further stated that although he had spoken with plaintiff during the years 1955-1956, he did not advise him of the position of the Madison Square Garden management concerning plaintiff's project subsequent to 1954, since he was unaware of said position although he assumed that it was still hostile. Indeed, deponent states that he did not know that plaintiff was still involved in the project during the period 1954-1956.

Plaintiff alleges that Mr. McGeary's lack of recollection is not to be believed because the undertaking was substantial and should have been remembered, and because there was an apparent hostility on the part of deponent. Plaintiff points toward certain discrepancies in deponent's testimony and contends that these "are part of a larger attitude." These so-called discrepancies do not in any way deal with the testimony regarding any conversations with Kilpatrick or the plaintiff, and it is the Court's opinion that these so-called "discrepancies" have little substance. Some of these "discrepancies" refer to statements made at different stages of the deposition which are allegedly

inconsistent.[1] Others refer to occurrences not necessarily within the knowledge of the deponent. Still others refer to

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[1] Pg. 4. The first of these alleged inconsistencies is as follows:

(p. 25) Q. Do you know a Mr. Griffis of Mr. Hempill's [sic] firm?

A. No.

(p. 98) Q. In 1955, do you recall or were you in touch with a Mr. Griffin (written phonetically) with reference to the Peto project?

A. If you are referring to Stanton Griffin—

Q. Yes.

A. I never met Stanton Griffin.

(p. 34) Q. Do you know Mr. Stanton Griffis?

A. I know who he is. I have seen him many times. He was a neighbor of mine in New Canaan for quite a while.

Q. Did you ever have any dealings with him in reference to this?

A. No.

Q. In reference to the Peto project?

A. No.

The only logical conclusion from this is that deponent did not connect the Mr. Griffis of Mr. Hemphill's firm with his neighbor Mr. Griffis at that time. As to the question of never having met Griffis, it is quite conceivable that deponent knew who Griffis was without having been acquainted with him. In any event, these portions of the deposition are not at all germane to the issues before the Court.

The third inconsistency refers to the transactions occurring in the 1940's. Deponent did not state that he did not know of Noyes' association with Madison Square Garden. He simply stated that he cannot recall at this time but that if Noyes had been associated with Madison Square Garden, deponent would have known of it. Can this be considered inconsistent? If anything, it should be interpreted as an honest statement as to deponent's recollection of events of twenty years past.

In the course of the deposition, numerous names are mentioned. Can deponent possibly recall the names and/or the relationships of all the parties to transactions occurring two decades ago? It is the Court's opinion that deponent has set forth a straightforward statement of his recollection. In any event, this "discrepancy" does not relate to the issue at bar.

events of twenty years ago which have very likely escaped deponent's power of recall. It is to be remembered that the Kilpatrick statements allegedly were made ten years ago while the alleged "discrepancies", to a great extent, concerned events twenty years ago. Deponent was reasonably clear on the 1955-1956 conversations with plaintiff. Accordingly, it is my opinion that plaintiff has not submitted any evidence to show that Mr. McGeary was not candid in his deposition.

But even if plaintiff's contention is accepted, has any matter been submitted to the Court which can be considered as evidence of an overt act? Plaintiff, in his affidavit, states the following:

> "In 1955, one of my potential backers, Cliff Hemphill, declined further participation in the project because Kilpatrick had warned him against participating. Another of my backers, John McGeary, was told that he should check with [Madison Square Garden] regarding my project, that in due course the 'right people' would build an arena in Philadelphia and that would be the time to join with [Madison Square Garden]." (Peto Affidavit, May 7, 1964 at ¶28.)

Plaintiff admits that said statement is hearsay but argues that it is admissible as an exception to the hearsay rule as a declaration against interest since declarant is dead, the declaration when made was against the pecuniary or proprietary interest of the declarant, the declarant had competent knowledge of the facts, and there was no motive to misrepresent at the time the declaration was made. 5 Wigmore, Evidence §§ 1456-69 (3d ed. 1940) [hereinafter cited as Wigmore].

However, the first question to be asked is: who is the declarant? Is it McGeary or Hemphill, or is it Kilpatrick? If the declarant is McGeary, the statement is clearly inadmissible since he is alive and available. 5 Wigmore § 1456,

at 260-62. If it is Hemphill, although he is not alive, there has been no showing that the declaration was against his pecuniary or proprietary interest when made. 5 Wigmore §§ 1457-66. The only possible declarant, therefore, is Kilpatrick. As to said defendant, the statement is something more than simple hearsay. There would seem to be two steps involved: the alleged "warning" from Kilpatrick to Hemphill (or the statement allegedly made to McGeary) and then the alleged repetition of said statement to plaintiff.

Both steps must satisfy the hearsay rule to be admissible. Examining step one, can it be said that the statement was against Kilpatrick's pecuniary or proprietary interest when made? If anything, the alleged statement would be in favor of Kilpatrick's interest. Indeed, according to plaintiff, said deceased defendant would have benefited by the unsuccessful termination of plaintiff's project.[2]

Even if plaintiff attempts to construe the alleged Kilpatrick statements as admissions, the hearsay rule must still be satisfied. 4 Wigmore § 1048, at 2. Plaintiff is attempting to testify to an event (the alleged Kilpatrick statement) which did not take place within his presence and which is not based upon his own knowledge. 5 Wigmore § 1361, at 2. Accordingly, said statement would still be hearsay.

But assuming *arguendo* that step two—the repetition of the statement by Hemphill or McGeary—could be reached, would the hearsay rule be satisfied? The conclusion would still be the same for the reason set forth *supra*: plaintiff is not the proper person to testify as to the fact that Kilpatrick made such a statement. Under the circumstances present here, it would be error to allow plaintiff to testify to the truth of a statement which was not made in his

[2] Pg. 6. The question of unavailability of the defendant Kilpatrick poses no problem since said defendant has died since the commencement of the instant action.

presence. Accordingly, it is concluded that defendants' hearsay objection is well taken.

How does this affect the Court's prior decision? The sole ground for the denial of defendants' motion for summary judgment appears at page 14 of the March 10, 1965 opinion where it was stated that "as to Kilpatrick, the date when he 'warned' Hemphill may be considered an issue in dispute." Rule 56 of the Federal Rules of Civil Procedure provides that affidavits shall be made on personal knowledge *setting forth facts admissible in evidence.* If, as has been herein determined, there is no evidence of plaintiff's which is admissible regarding overt acts on or about the dates in question, then certainly the date of that transaction cannot be in issue.[3]

And since this is the only date that can save plaintiff's claim from the applicable statute of limitations, it is my opinion that the prior ruling cannot stand. See *Garelick* v. *Goerlich's, Inc.*, 323 F. 2d 854 (6th Cir. 1963) (per curiam); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956); *Rutkin* v. *Reinfeld*, 229 F. 2d 248 (2d Cir.), cert. denied, 352 U.S. 844 (1956); *Molinas* v. *National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961). On the basis of the record, no purpose would be served by holding a hearing on this particular issue.

Plaintiff again attempts to reargue herein that the statute of limitations was tolled by reason of the commencement of the Government action in *United States* v. *International Boxing Club of New York*, Docket 74-81 (S.D.N.Y. March 17, 1952). The Court adheres to its prior memorandum of April 1, 1966, wherein it was held that the instant suit is not sufficiently similar to the Government action so

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[3] Pg. 7. Plaintiff's affidavit of October 12, 1966, which sets forth the dates of the alleged conversations with Hemphill and McGeary does not in any respect affect this determination. Although plaintiff can set forth the dates of the conversations, this is not probative of the issue of whether in fact Kilpatrick made any statements.

as to toll the statute of limitations. *Leh* v. *General Petroleum Corp.*, 382 U.S. 54, 59 (1965); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 323 (1965).

Accordingly, upon reargument, defendants' motion for summary judgment on the ground that plaintiff's claim is barred by the statute of limitations is granted.

It is so ordered.

Dated: New York, New York.

November 30, 1966.

CHARLES H. TENNEY
U.S.D.J.

APPENDIX F

Motion

Motion by Plaintiff which was granted by the Court of Appeals for hearing June 15, 1967, and which approved removal of Plaintiff's counsel, Richard C. Stein (This Motion, verified by the Clerk of the Court of Appeals, now filed with the Clerk of this Court)

6255 Miller Road,
South Miami, Fla., 33155
June 10, 1967

A. Daniel Fusaro Esq., Clerk,
United States Court of Appeals,
Second Circuit,
Foley Square,
New York 10007.

PETO v. MSG ET AL.: Case #31106

Confirming my talk with Mr. Guadaro on the 8th instant, I wish to ask the Court to permit you to accept a Brief signed 'pro se' because of termination of employment of Mr.

Stein, as evidenced in my affidavit dated May 8, 1967 which is returned herewith.

My adversaries were notified of this action March 7th last, as per attached photo. Mr. Stein waited until after I had left New York on that date, to write me that he is 'available'.

On May 18th last I requested Mr. Stein to name a date for inspection of my records and a settlement of matters remaining from the agreement dated September 30, 1965. No reply has been received.

My previous willingness to try to keep Mr. Stein in the picture, despite the disfavor into which my case had fallen in 1966, vanished when I learned that the suspended Greenfield was the one who withdrew vital records from my file, and that the end result of Mr. Stein's efforts was to cover up for Greenfield.

The attached letter of November 20, 1957 shows that I came into his hands by referral from Senator John H. Farrell, whom I held in high esteem.

I can be reached in New York at PLAZA 3-6162.

Sincerely,

LEONARD A. PETO
Leonard A. Peto

The hearing of the within Motion has been set for Thursday June 15, 1967, at 10:30 a.m. in Room 1705, U.S. Courthouse, Foley Square, Ney York 7, N. Y.

A. DANIEL FUSARO
Clerk

June 13, 1967

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 31106

LEONARD A. PETO, *Plaintiff-Appellant*

v.

MADISON SQUARE GARDEN CORPORATION, ET AL.,
Defendant-Appellees

Affidavit by Appellant

LEONARD A. PETO, duly sworn, deposes and says:

Because of the lateness in receipt of Opinion #32972 (see Annex 'A') I was obliged to instruct Richard C. Stein, Esq. to file Notice of Appeal therefrom, although theretofore having notified the District Court of my wish to change representation (Annex 'B').

Until receipt of a letter dated August 17, 1965 from Howard I. Rhine, Esq., then Law Clerk to Judge Tenney, I had been unaware of Opinion #30968 March 10, 1965 (see letter from Greenfield dated August 29, 1965).

I am unaware of what events caused Greenfield to believe that this case had been 'settled' (letter October 22, 1965).

Recent discovery of theft of records by Greenfield, and perhaps by Rothstein also, mentioned in my letter of today's date to Mr. Bonomi (attached with enclosure) led me to notify Mr. Stein that his employment is at an end.

Signed in my presence May 5, 1967 LEONARD A. PETO

FRANCES S. PHILIPS
Notary Public, State of Florida at Large
My Commission Expires Oct. 13, 1967
Bonded by American Surety Co. of N. Y.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 69—September Term, 1967.

(Argued October 6, 1967 Decided October 27, 1967.)

Docket No. 31106

LEONARD A. PETO, *Plaintiff-Appellant,*

MADISON SQUARE GARDEN CORP., JAMES D. NORRIS, RINGLAND F. KILPATRICK, JR., Executor of the Estate of John Reed Kilpatrick, Edward S. IRISH, ARTHUR M. WIRTZ and WALTER ANNENBERG, *Defendants-Appellees.*

Before: HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Charles H. Tenney, *Judge,* in an action for treble damages under the Sherman Act, 15 U.S.C. § 1 et seq. and the Clayton Act, 15 U. S. C. § 12 et seq., granting defendants' motion for summary judgment.

Affirmed.

LEONARD A. PETO, *pro se.*

ROY L. REARDON, New York, New York (John C. Diller, Simpson, Thacher & Bartlett, Emil N. Levin, Abraham L. Bienstock, and Sidney O. Friedman, New York, New York, on the brief), *for Appellees.*

Per Curiam:

This an action under the Sherman and Clayton Acts, 15 U. S. C. § 1 et seq., for treble damages. In the district

court defendants were granted summary judgment on the ground that plaintiff's claim is barred by the applicable statute of limitations. We affirm.

Peto instituted this action in March 1958 alleging that defendants have established a monopoly in the professional hockey industry and that they conspired to prevent plaintiff from constructing and operating a hockey arena which would have competed with defendants' enterprises. Section 4B of the Clayton Act, 15 U.S.C. § 15b, bars actions not commenced within four years after the cause of action accrued. A "right of action for a civil conspiracy under the antitrust laws accrues from the commission of the last overt act causing injury or damage." *Garelick* v. *Goerlich's, Inc.*, 323 F. 2d 854, 855 (6th Cir. 1963). In the material submitted in opposition to the motion for summary judgment plaintiff failed to establish that there was any triable issue as to the occurrence within four years of the time the action was commenced of any overt act in furtherance of the alleged conspiracy.

Plaintiff resorts to the provisions of Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), in an effort to bring himself within the statutory period of limitation. Under Section 5(b) the statute of limitations is tolled for a private action which is "based in whole or in part on any matter complained of" in a proceeding brought by the United States. Plaintiff cites *United States* v. *International Boxing Club*, 150 F. Supp. 397 (S.D.N.Y. 1957), aff'd 358 U.S. 242 (1959), as having the effect of tolling the statute applicable to his claim. But the government's suit must bear "a real relation to the private plaintiff's claim for relief." *Leh* v. *General Petroleum Corp.*, 382 U.S. 54, 59 (1965). Comparing the claims asserted in the present case with those asserted in the *International Boxing Club* case, we find that the conspiracies to which they refer are entirely different, involve different sports activities and cover different periods of time. The only similarity be-

tween the two actions is found in the fact that some of the defendants are the same. This is obviously insufficient to provide a ground for tolling the statute of limitations.

The judgment is affirmed.

APPENDIX H

Ruling of the Court of Appeals, November 16, 1967, Denying Plaintiff's Motion for Rehearing

A petition for rehearing having been filed herein by appellant pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

PAUL R. HAYS
ROBERT P. ANDERSON
WILFRED FEINBERG
Circuit Judges

November 16, 1967

APPENDIX I

Ruling of the Court of Appeals, November 30, 1967, Denying Plaintiff's Motion for Mandate Stay or Recall

A motion to stay the issuance of the mandate having been filed herein by appellant pro-se and said motion having been treated as a motion to recall the mandate and to stay its reissuance pending petition for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

PAUL R. HAYS
ROBERT P. ANDERSON
WILFRED FEINBERG
Circuit Judges

November 30, 1967

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1121

LEONARD A. PETO,

Petitioner,

v.

MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS, RINGLAND F. KILPATRICK, JR., Executor of the Estate of JOHN REED KILPATRICK, EDWARD S. IRISH, ARTHUR M. WIRTZ, and WALTER ANNENBERG,

Respondents

PETITION FOR RE-HEARING and SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD A. PETO
Petitioner, Pro Se,
6255 Miller Road,
South Miami, Florida 33155

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1121

LEONARD A. PETO,

Petitioner,

v.

MADISON SQUARE GARDEN CORPORATION, JAMES D. NORRIS, RINGLAND F. KILPATRICK, JR., Executor of the Estate of JOHN REED KILPATRICK, EDWARD S. IRISH, ARTHUR M. WIRTZ, and WALTER ANNENBERG,

Respondents

PETITION FOR RE-HEARING
and
SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices:

Leonard A. Peto, petitioner, prays for re-consideration of the Petition docketed February 16 1968, denied March 18 1968, by virtue of acceptance into the Record —

noted by the Clerk of this Court March 27 1968 — of an affidavit described as a "brief" in the Court of Appeals (2nd) which thus had disregarded the evidential value of photocopies of original documents marked for trial during Petitioner's depositions, but suppressed from the District Court, which thus was misled into error and a mistrial.

A Motion (Petition p 21) also offered an affidavit February 13 1968 with proofs that the District Court failed to act on a confession by Petitioner's former attorney that Petitioner's case had been "satisfactorily disposed of" long prior to the Motion for summary judgment and thus opposition was reduced to one of token character, and a sham. Petitioner respectfully requests that the affidavit February 13 1968 be incorporated into the Record.

REASONS WHY A RE-HEARING SHOULD BE GRANTED

1. Theft of documents concerned Petitioner's contacts with Tournament of Champions Inc (Aff pp 4-7)

Respondents' moving affidavit February 25 1964 included a letter May 19 1948 (Aff p 4) the first two lines of which letter stated that Petitioner would report to the NHL Governors in good time on the status of Petitioner's sports arena project.

In October 1960, Petitioner's counsel had stolen such letter (D-98/H; Rec 201), and also the answering telegram May 25 1948 (D-98/J) and a confirming letter of like date (D-98/i), from Petitioner's files. Thus, refer-

ence to such letter of May 19 1948 was ignored in the answering affidavit, a comparison of which by Petitioner was avoided in the way described at p. 2 of the affidavit September 30 1967.

Respondents likewise suppressed the confirming letter and telegram dated May 25 1948.

The District Court commented on the letter of May 19 1948 only to the extent of ten quoted words that Petitioner "would have a report in his hands in good time" (Pet 5a); such comment being superfluous because the report itself, dated June 2 1948, was next attached to the moving affidavit (Pet 5a)

The Court refrained from comment on the more than 300 words in the letter of May 19 1948 which include a charge that NHL president Campbell (Aff p 4) had leaked to the Press some details of Petitioner's contact with Tournament of Champions Inc., despite such important link with the Government Action (C.A. 74-81), clearly apparent to anyone reading such Complaint, as Judge Tenney had done (Pet 12a)

2. The importance of a suppressed letter May 28 1949 (Aff p. 58)

Petitioner's recital on May 26 1948 (Rec 209) of assurances given to him in June 1948 that the NHL Governors would act favorably on an application for a franchise, was quoted by Judge Tenney (Pet pp 5a-6a) who then mistakenly accepted a letter by Campbell June 7 1949 (Rec 210) as the reply to Petitioner's letter of May 26

1948, because the actual reply of May 28 1949 (marked for trial D-23) **was suppressed by both sides.**

The photocopy of the actual reply (aff p 58) shows Campbell tacitly confirming such assurance given to Petitioner in June 1948, in view of which Petitioner had refrained from formally asserting "force majeure" (building restrictions); Petitioner's outlays in purchase of professional hockey players from NHL Clubs, and other large expenditures.

The District Court was further misled by the concluding paragraph of Campbell's letter of June 7 1949 that "the original application and the option resulting from it were definitely terminated in June 1948" (Pet 6a) which referred to the application made by Canadian Arena Company for permission to sell its dormant franchise to Petitioner; which dormant franchise had become extinct due to the new agreement between the six member Clubs October 14 1947. The RESOLUTION December 14 1945 reads:

> "Whereas Canadian Arena Company * * in accordance with arrangements made between Montreal Professional Hockey Club Limited and the League, has agreed to dispose of such franchise to L. A. Peto and associates * * " (Rec 194)

Respondents had suppressed from the Court the fact that Canadian Arena Company was to be reimbursed for its "Maroon" franchise when a new franchise would be issued to Petitioner, and such re-imbursement was made through action by NHL Governors, as released to Cana-

dian newspapers September 27 1967 by NHL president Campbell.

The newspaper reports were made known to the Court of Appeals, and incorporated in the Petition for re-hearing, November 9 1947.

Further misrepresentation by Mr Campbell follows:

> "After he had been refused by the NHL, he unsuccessfully sued the League and several owners. Peto later got his $25,000 back from the Canadian Arena Company * *"

(Pet for re-hearing p. 18)

The only suit instituted by Petitioner was that in the District Court March 17 1958, C.A. 131-72.

3. **Other theft of correspondence** (Aff pp 11-12)

The removal of miscellaneous letters by corrupt attorney Greenfield in October 1960 weakened Petitioner's defense to the then-planned motion for summary judgment. Even Petitioner's formal resignation from Canadian Arena Company to undertake the formidable task in Philadelphia (D-103/A) was stolen. Nothing remains to identify Petitioner's service with Canadian Arena Company, and to hockey, excepting a letter by CAC's general manager, Selke, to Grace of Cincinnati Gardens Inc., June 22 1954 (D-39) in the Record at p. 274

Published facts, also withheld from the Record, show Canadian Arena Company in dire financial straits, and